In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1552

HOWARD EDELSTEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner claims that the district court erred in permitting petitioner's accomplice, who was a government witness, to testify that he (the accomplice) had pleaded guilty to the charges against him in the indictment. Petitioner also challenges the admissibility of the evidence of petitioner's prior similar acts and the admission of statements of co-conspirators.

Following a jury trial in the United States District Court for the Western District of Kentucky, petitioner was convicted on a four-count indictment charging conspiracy, in violation of 18 U.S.C. 371; the making of a destructive device without having filed a written application form as required by 26 U.S.C. 5822, in violation of 26 U.S.C. 5861(f) and 5871; the possession of

unregistered firearms, in violation of 26 U.S.C. 5861(d) and 5871; and the damaging of a building and personal property used in and affecting interstate commerce, in violation of 18 U.S.C. 844(i). He was sentenced to five years' imprisonment on the conspiracy count, the term to run consecutively with concurrent terms of ten years' imprisonment on counts two, three and four. The court of appeals affirmed (Pet. App. B.).

1. On March 29, 1971, the Heid Printing Company was substantially damaged by a dynamite explosion (I Tr. 28-30, 61).[1] A mechanism found on the floor of the building appeared to be a timing device (I Tr. 30). After interviewing Mr. Heid, the owner of the building (I Tr. 33), an arson investigator interviewed petitioner, a pharmacist and neighbor of Mr. Heid, who stated after receiving *Miranda* warnings that "It [the explosion] couldn't have happened to a nicer guy" (I Tr. 35-36, 51).

At trial Clinton Oates, a life insurance salesman who was also involved in a family fireworks business, testified that he had known petitioner since 1967, when petitioner began to purchase fireworks from him (I Tr. 69). Approximately every three months from 1967 through 1971, petitioner purchased six to twelve progressively larger salutes (I Tr. 72-74). In June 1969, petitioner told the salesman that he wanted to destroy the printing company and at that time he purchased some fifteen inch salutes which were five inches in diameter and about six and one half inches long (I Tr. 74-75).

The owner of the printing company testified that on June 3, 1969, someone had thrown an explosive de-

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[1] "I Tr." and "II Tr." refer to the transcript of the proceedings at trial, contained in two volumes paginated concurrently.

vice onto the sidewalk in front of his building, which blew out half of the plate glass (II Tr. 66). He further testified that in February 1969 petitioner threw an explosive device onto the driveway of his home causing damage (II Tr. 67-68). He also stated that in October 1970 petitioner threw an explosive device into his back yard which left a hole three feet wide and five inches deep (II Tr. 60-61, 100-101). On other occasions petitioner was observed by Mr. Heid and a neighbor throwing firecrackers as he passed the Heid house (II Tr. 81, 84-88, 93).

Following the preceding testimony of Mr. Heid, the court gave the following cautionary instruction (II Tr. 64-65):

> Now, Ladies and Gentlemen: I want to give you this special cautionary instruction; at this time, and of course at the conclusion of the case I will repeat it again, the fact that Mr. Edelstein may allegedly have committed some offense at some time other than that charged in the indictment is not evidence or proof whatsoever that he did or caused the thing to be done charged in the indictment on trial here, even though both offenses may be of a similar nature.
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> Evidence as to an earlier offense, allegedly, of a like nature may not therefore be considered by the Jury in determining the guilt or innocence of the accused as to the act charged in the indictment, nor may such evidence be considered for any other purpose whatever unless the Jury first finds from the evidence in the case on trial, standing alone, has established the guilt of the accused.
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> If the Jury, at the conclusion of this case, should find beyond a reasonable doubt from all of the

other evidence in the case that the accused did the acts charged in the indictment, then you may consider evidence of an alleged earlier offense of a like nature in determining the intent, motive, or state of mind with which the accused did act as charged in the indictment, and where all of the elements of an alleged earlier offense of a like nature are established by evidence which is clear and conclusive, the Jury may then, if it does, but is not obligated to draw the inference and find that the doing of the act charged in the indictment and, in the doing thereof, the accused acted willfully and with specific intent and not because of mistake, accident or other innocent reason.

The evidence also showed that in January 1971 petitioner again stated that he wanted the printing company destroyed and asked Oates if he would find someone to do the job (I Tr. 93-94). Oates solicited one Gordon Ziler, who agreed to dynamite the building (I TR. 94). Oates received an envelope containing $1,000 from petitioner and proceeded to steal thirty-five to forty sticks of dynamite and six or eight caps from a construction site (I Tr. 96-97, 102). Thereafter, petitioner gave Oates an additional $3,000 of which $1,000 was to be used by Oates for his expenses (I Tr. 103-105). Oates gave the explosives to Ziler along with wire, batteries and a timing device (I Tr. 106-108). Together they assembled the bombing device and placed it in the building (I Tr. 111-112, 114). On the morning following the bombing Oates called petitioner and stated that he needed $600 to pay Ziler (I Tr. 117). That afternoon petitioner gave Oates the money (I Tr. 118). After the bombing petitioner stated to Oates that he "wanted the place completely destroyed this time, or Mr. Heid killed" (I Tr. 118-119).

Howard Gordon Ziler also testified for the government. He too admitted his complicity in the offense and that he had pleaded guilty to the charge on which petitioner was being tried (II Tr. 8).

The court instructed the jury that the testimony of Oates and co-defendant Ziler, who admittedly took part in the crime of which defendant was charged, should "be received with caution and you should not accept it unless it so far harmonizes with all of the other testimony in the case as to leave in your mind no reasonable doubt as to its truth" (II Tr. 220).

2. Petitioner contends that it was "plain error" to permit Ziler, the co-conspirator, to testify that he (Ziler) had pleaded guilty to the charge for which petitioner was indicted. This claim is without merit. It is well settled that the government is entitled to elicit whatever information could be damaging to its witnesses' credibility, "such as a guilty plea to an indictment, 'to prevent the defense from creating a misleading impression, or the jurors from thinking, that the Government is seeking to keep something from the jury.'" *United States* v. *Rothman,* 463 F. 2d 488, 490 (C.A. 2), certiorari denied, 409 U.S. 956; citing *United States* v. *Del Purgatorio,* 411 F. 2d 84, 87 (C.A. 2); *United States* v. *Freeman,* 302 F. 2d 347, 350 (C.A. 2), certiorari denied, 375 U.S. 958; and see *United States* v. *Crosby,* 294 F. 2d 928, 948 (C.A. 2), certiorari denied *sub nom. Mittleman* v. *United States,* 368 U.S. 984.

Moreover, since the witness Ziler testified to his complicity in the offense, it is difficult to see how petitioner could possibly have been prejudiced by the further admission that Ziler had formally pleaded guilty. On the contrary, petitioner's counsel exploited the evidence

regarding Ziler's cooperation and plea by suggesting to the jury that his testimony was given for the purpose of obtaining "leniency" (II Tr. 39).

In *United States* v. *Harrell*, 436 F. 2d 606 (C.A. 5), upon which petitioner principally relies, a co-defendant pleaded guilty to a conspiracy count, which named the defendant as a co-conspirator, and testified as a witness for the *defendant*. Although the co-defendant had insisted at the time he pleaded guilty that the defendant was not one of his co-conspirators as charged in the indictment, he was permitted to testify at trial—without explanation—that he had pleaded guilty to the conspiracy count. In holding this to be plain error, the court of appeals stated (436 F. 2d at 614):

> * * * Norris and his counsel repeatedly pointed out that he was pleading guilty to conspiring with the "distilling fellows", not with Harrell. But this attempt to limit the nature of the plea, or more properly the nature of the admissions implicit in it, was never called to the jurors' attention during the trial. The impression was left that somehow the plea of guilty was inconsistent with Norris' testimony at trial: that proof of the plea of guilty was in the nature of impeachment of Norris' trial testimony, or worse yet, that it somehow proved Harrell's guilt. No limiting instruction was given when the evidence as to the guilty plea was received.

Obviously, nothing comparable occurred here.

The remaining cases upon which petitioner relies also differ significantly from this case. They mainly involve instances where a co-defendant has pleaded guilty immediately prior to trial or in the midst of trial. The co-defendants in those cases did not testify as witnesses for the government, and the failure of the district courts

in these circumstances to grant the defendants' requests for limiting instructions was held to constitute prejudicial error. See, *e.g.*, *United States* v. *Toner*, 173 F. 2d 140 (C.A. 3); *United States* v. *Hall*, 178 F. 2d 853 (C.A. 2); *Trussell* v. *United States*, 278 F. 2d 478 (C.A. 6).[2]

3. Petitioner further claims that the evidence of other criminal acts, that is, the throwing of explosives at the Heid Printing Company and the Heid home, unduly prejudiced him. Proof of other crimes, however, is admissible to show motive, intent, knowledge or common scheme. *E.g.*, *United States* v. *Turner*, 423 F. 2d 481 (C.A. 7), certiorari denied, 398 U.S. 967; *United States* v. *Carter*, 401 F. 2d 748 (C.A. 3), certiorari denied, 393 U.S. 1103; *Robinson* v. *United States*, 366 F. 2d 575 (C.A. 10), certiorari denied, 385 U.S. 1009. In this trial, knowledge and intent were the key elements to be proved. Moreover, as we have detailed, the court's instruction limiting the effect of this testimony adequately protected petitioner's rights.

4. Petitioner also claims that the statements of two co-defendants were inadmissible hearsay as to him. Co-conspirator Cent testified that based on conversations

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[2] *Babb* v. *United States*, 218 F. 2d 538 (C.A. 5), is the only case cited by petitioner in which the co-conspirator both pleaded guilty and testified for the prosecution. While we believe that the court of appeals there erroneously applied holdings rendered in the contexts described above in concluding that it was error to have elicited such testimony, the holding in *Babb* does not conflict with the decision here. Unlike the instant case, the defendant in *Babb* specifically requested a limiting instruction and the reversal of the conviction was predicated on the failure of the district court to so charge the jury (218 F. 2d at 542). The failure of the district court — in the context of this case — similarly to instruct the jury *sua sponte* on the purpose of the testimony was not plain error. See *United States* v. *Kimbrew*, 380 F. 2d 538, 540 (C.A. 6).

he had with Oates he formed the impression that there were two unknown parties who "were feuding" and "that one of them was going to try and dynamite some building of the other's" (II Tr. 5, 6). Co-conspirator Ziler testified that Oates told him that he was planning the dynamiting for a friend who was a pharmacist (II Tr. 12-13). These statements were made during the conspiracy to commit the offense and in furtherance thereof, and were thus admissible under the co-conspirator exception to the hearsay rule as explained in *Dutton* v. *Evans,* 400 U.S. 74, 81, on which petitioner mistakenly relies (Pet. 9). Moreover, the alleged hearsay declarant (Clinton Oates) testifed at the trial and was available for cross-examination. As a result, any prejudice to petitioner's Sixth Amendment right of confrontation—which was one of the principal points of contention in *Dutton* v. *Evans, supra*—was eliminated. See *Nelson* v. *O'Neil,* 402 U.S. 622, 627.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1973.